STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

LINDA MARSHALL and
CHARLES MARSHALL,

Plaintiffs,

vs. Case No. 2006-1262-NO

CRANK'S CATERING AND FOOD,
a Michigan corporation,

Defendant.

_____/

OPINION AND ORDER

Defendant Crank's Catering and Food moves for summary disposition under MCR 2.116(C)(10).

I. BACKGROUND

Plaintiffs Linda Marshall and Charles Marshall filed this action on March 23, 2006 asserting they are married. On January 15, 2006, plaintiff Linda Marshall avers she was walking through defendant's parking lot when she tripped and fell after stepping on a hidden defect in the pavement.

Accordingly, plaintiffs' complaint alleges: I. Negligence and II. Loss of Consortium.

Defendant now moves for summary disposition.

II. STANDARD OF REVIEW

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. The reviewing court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence available to it in the light must favorable to the nonmoving party.

Village of Dimondale v Grable, 240 Mich App 553, 566; 618 NW2d 23 (2000). The nonmoving party must proffer evidence establishing a material issue of disputed fact exists for trial to avoid summary disposition. *Id.*

Generally, summary disposition is premature if it is granted before discovery on a disputed issue is complete. However, summary disposition may be appropriate before discovery is complete if further discovery does not stand a fair chance of uncovering factual support for the opposing party's position. *Kassab v Michigan Basic Property Ins Ass'n,* 185 Mich App 206, 216; 460 NW2d 300 (1990).

III. ANALYSIS

In *Corey v Davenport College of Business (On Remand),* 251 Mich App 1, 3-4; 649 NW2d 392 (2002), the court stated:

> The Supreme Court in *Lugo[v Ameritech Corp, Inc,* 464 Mich 512; 629 NW2d 384 (2001),] first reiterated the general rule that a landowner has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Id.* at 516. However, the landowner's duty does not generally include the removal of open and obvious dangers:
>
> > "[W]here the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee." [*Id.,* quoting *Riddle v McLouth Steel Products Corp,* 440 Mich 85, 96; 485 NW2d 676 (1992).]
>
> The *Lugo* Court further explained that "the open and obvious doctrine should not be viewed as some type of 'exception' to the duty generally owed invitees, but rather as an integral part of the definition of that duty." *Lugo, supra* at 516. The Supreme Court held that the landowner is not required to protect an invitee from an open and obvious danger unless "special aspects" of the condition make it unreasonably dangerous. *Id.* at 517. Special aspects that serve to remove a condition from the open and obvious danger doctrine are those that "give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided...." *Id.* at 519. * * * The Court stated that liability would not be imposed "merely because a particular open and obvious condition has some potential for severe harm." *Id.* at 518, n 2.

The *Corey* Court explained:

> In *Joyce v Rubin,* 249 Mich App 231; 642 NW2d 360 (2002), this Court recently applied the principles expressed in *Lugo* in a case similar to the instant case, i.e., one involving a slip and fall incident on a snowy and icy sidewalk. In *Joyce, supra* at 235-237, this Court initially addressed whether the open and obvious danger doctrine applies only to claims of failure to warn and not to claims of failure to maintain premises. The *Joyce* Court specifically held that the open and obvious doctrine "clearly applies to this case involving a common-law duty to maintain premises and, therefore, the trial court correctly conclude the doctrine applies here." *Id.* at 237. This conclusion also clearly applies to the present case.
>
> The Court in *Joyce* next analyzed whether the ice and snow on the sidewalk was an open and obvious condition. *Id.* at 237-238.
>
> > The test to determine if a danger is open and obvious is whether "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection." *Novotney v Burger King Corp (On Remand),* 198 Mich App 470, 475; 499 NW2d 379 (1993). Because the test is objective, this Court "look[s] not to whether the plaintiff should have known that the [condition] was hazardous, but to whether a reasonable person in his position would foresee the danger." *Hughes v PMG Bldg, Inc,* 227 Mich App 1, 11; 574 NW2d 691 (1997). [*Joyce, supra* at 238-239.]

Corey, supra at 4-5.

As a preliminary matter, the crack that allegedly caused plaintiff Linda Marshall's injuries was clearly open and obvious, and not complex. Plaintiffs have not explained how further discovery would stand a fair chance of uncovering factual support for their position. Hence, consideration of summary disposition at this time is warranted.

Plaintiffs characterize the defect as having special aspects because the crack in the parking lot was filled with loose material. However, the loose fill material presents the same condition as if the crack was still filled with the original broken concrete: namely, a non-solid and unstable surface. The attempted repair did not introduce a new or greater danger that created a uniquely high likelihood of harm.

Moreover, the crack was readily and entirely avoidable. Plaintiff Linda Marshall could have easily stepped over the crack or walked around it.

Plaintiffs' reliance on the City of Warren's adoption of the 2003 ICC International Property Maintenance Code as creating an exception to application of the open and obvious doctrine is misplaced. The City of Warren did not adopt the Code until March 14, 2006, two months *after* plaintiff Linda Marshall's accident.

IV. CONCLUSION

For the reasons set forth above, defendant Crank's Catering and Food's motion for summary disposition is GRANTED under MCR 2.116(C)(10).

Accordingly, plaintiffs Linda Marshall and Charles Marshall's complaint is DISMISSED, with prejudice. MCR 2.116(I)(1).

This Opinion and Order resolves the last pending claim in this matter and closes the case. MCR 2.602(A)(3).

IT IS SO ORDERED.

Diane M. Druzinski, Circuit Court Judge

Date: AUG - 8 2006

DMD/aac

cc: Paul R. Swanson, Attorney at Law
R. Carl Lanfear, Attorney at Law

DIANE M. DRUZINSKI
CIRCUIT JUDGE

AUG - 8 2006

A TRUE COPY
CARMELLA SABAUGH, COUNTY CLERK
BY: Court Clerk